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United States Circuit Court of Appeals

For the Ninth Circuit

OSCAR SPORGEON,
Plaintiff in Error,

vs.

ANDREW F. MAHONEY et al.,
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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9 Calif. Jur. 588.

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Labbatt, Master and Servant, Sec. 1582, page 4804 (Sec. Ed.).

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STATEMENT OF THE CASE.

On the third of September, 1924, the plaintiff commenced the action on the law side of the court claiming that he had suffered permanent injury while he was acting as second mate on a vessel known as "John C. Kirkpatrick." The complaint set out that the cause of the injury was that a certain bolt "was pulled loose on account of the manner in which it was fastened to the deck, and on account of the rotten condition of said deck." (T. 4.)

The answer among other matters says that the bolt was not loose, but that it was pulled out "by reason of the failure to use a block in connection with said eye-bolt, said bolt was subjected to an enormous and severe strain", etc. (T. 12.)

Again under separate defense number three the defendant plead that the injury to plaintiff was "plaintiff's failure to use a block in connection with the rope running through the eye-bolt." (T. 15.)

The answer also set out that the plaintiff was familiar with "the mode of fastening the eye-bolt to the deck," etc. (T. 14.)

The case came on regularly for trial before the Hon. Geo. M. Bourquin, J., who at the end of the trial directed a verdict for the defendants. The grounds assigned in the motion for a directed verdict were as follows:

(1) There was no negligence shown on the part of the defendants.

(2) The plaintiff assumed the risk. We believe that such was the court's idea from the following expression by the court in granting the motion at the end of the trial for a directed verdict. The court said:

"When the plaintiff devoted this ringbolt to moving cargo, he misused it. Its owner never intended it should be used for that purpose; the owner could not guard against it, and if plaintiff took a chance, and injured himself, *he assumed all the risk,* and his injury, as unfortunate, as it is, is nothing for which he can ask the owners to compensate him."

EVIDENCE IN THE CASE.

On page 36 of the transcript is a drawing made by the defendant's counsel, and for that reason is as favorable to the defendant as it can possibly be.

The testimony is uncontradicted that it was the duty of the mate, Ole Grande, to see that the ring-bolt in question, and which pulled out and thereby injured the plaintiff, was safe. (T. 71.) It was this same Ole Grande who refused the plaintiff a snatch-block, of which they had plenty on the vessel. (T. 28.) There is a great deal of testimony in favor of plaintiff as well as in favor of the defendant having reference to the proper use of the ring-bolt. The testimony is greatly in conflict on that point.

Witness Frank H. Ainsworth for plaintiff testified:

"The ringbolt, defendant's exhibit No. 1, is what they call a ringbolt with a lag-screw, and it is used for various purposes on ships to secure articles. One could not tell by looking at it, except from below, if this bolt was clinched under deck. *If a person sees a bolt of that size on the deck, they would use it for the purpose for which it would be necessary to use a bolt of that size.* There are several methods used in order to make a bolt solid so it will not come out or work loose, one by riveting it over a washer, one by putting a nut over a washer, and one by putting a key through it, over a washer. That would make a good solid method. I imagine the wood around such a bolt would become soft if

used for six or seven years. If hit by lumber from time to time, it would tend to loosen it and when loosened it would come out." (T. 40.)

On cross-examination the witness testified:

"It is a common practice, but not a good practice, to run a line through a ringbolt of this kind."

The last statement is important because the judge found that the plaintiff when using the bolt for the purpose of putting a line through it used it for a purpose for which it was not intended. (T. 77.) The court said:

"His misuse of the appliances which the owner furnished him, he is not entitled to ask the master to compensate him for the injury he suffered, serious as it is." (T. 77.)

Lauritzen, a witness called for the defendant testified that he was the winchman on the vessel at the time of the accident. There were three eye-witnesses to the accident; one is Lauritzen and the other is plaintiff. Mr. Lauritzen had been a winchman on the ship for a long time, and he knew better than any other person that this ring-bolt was not used in any improper manner. He testified as follows:

"Q. You have been a winchdriver for many years, haven't you?

A. Yes sir." (T. 22.)

"Q. And saw them use this particular bolt in many places the same as it was used that time; it was nothing unusual?

A. They usually lead it the way it will lead best.

Q. And at this time, fastened the way it was, you took it for granted it was like any other bolt on the ship?

A. Yes, sir."

"The ship was built in 1917, and the water was bound to seep in and weaken it for this length of time," said witness Lauritzen. (T. 23.)

He also said that he had never seen such a bolt used for such purpose. By that he meant a bolt without being clinched.

Lauritzen said: "No wonder it pulled out, because I thought it was rather small." (T. 24.)

The court forgot entirely the testimony of the plaintiff's witnesses, which is shown in many instances, and as to the improper use of the appliances on which the court based its whole decision the following is only one instance of the fact that the court forgot the testimony. The court said:

"He (the plaintiff) could have rigged slings at other places with blocks." (T. 75.)

The court was mistaken in this statement, as appears from the following testimony of plaintiff:

"I could not find any blocks. (T. 39.) The chief officer told me that he didn't know that there was any on board the ship." (T. 37.)

The master said:

"There were snatch-blocks on the ship at the time. (T. 51.) If you had a snatch-block on the

bolt that would eliminate a certain amount of strain. (T. 51.) I might say in rare cases I might use that a couple of times with a snatch-block. I would say you could use it for discharging a load or two like he (the plaintiff) did." (T. 51.)

Witness Becker, for the defendants, said:

"By the use of a snatch-block the strain on the bolt would be all of 35 per cent less." (T. 62.)

Plaintiff said:

"The chief officer (that was Mr. Grande) was aft using them particular ringbolts loading the ship." (T. 28.)

This is not contradicted.

The reason for the directed verdict was that the plaintiff did not make a proper use of the appliances and particularly this ring-bolt and snatch-block, but on this point the testimony was in conflict, even the master on the vessel testified as follows:

"I would say you could use it" (meaning the ring-bolt that was pulled out) "for discharging a load or two like he did." (T. 50.)

Mr. Lancaster, an old mariner, called by the defendants, said:

"From the looks of it" (that is the ring-bolt), "I would not expect this bolt to give way when changing a load of laths weighing fifteen hundred pounds from the hatch aft." (T. 56.)

It is true that both the master on plaintiff's own vessel as well as Captain Lancaster from another

vessel testified that plaintiff had improperly rigged up the load, but no testimony is given to the effect that plaintiff could anticipate an accident by reason thereof. In other words there is no testimony of any witness to the effect that this bolt was supposed to stand a strain of no more than fifteen hundred pounds, the weight of the load.

The vessel had been inspected, but not as to bolts. That is what one of the owners said:

"The inspectors would not make any inspection in order to find out if the bolts or screws were safely fastened to the deck."—"The mate would have to know if the bolts and screws were not in shape. He has charge of the after end and reports to his superior officer." (T. 71.)

It was this first mate who "came around, and cursed and swore at the second mate (the plaintiff), because the lumber was not coming fast enough." That is the testimony of witness McFadden. (T. 46.)

This bolt was supposed to stand a strain of between 5,000 and 50,000 pounds, and it was pulled out when a load was hoisted weighing according to the plaintiff 1,000 pounds (T. 32), and according to witness McFadden 1,500 pounds. By reason of want of snatch-blocks and the angle an additional stress of 35 per cent would be added. That would make the total stress, or pull not more than 2,025 pounds which is the greatest pull under any testimony, but according to plaintiff himself, "It was just like it slid out."

Ole Grande, for the defendant, testified that if the plaintiff had pulled a light load, the strain would not have been near as great. (T. 65.) This witness whose duty it was to look out for the safety of the ring-bolt, testified as follows:

"The load that was pulled out was what I would call an average load. It was a load of planks, 2 by 3 by 12. They are sometimes heavy, and there must have been a strain on it to pull it out. The strain would not have been near as great, if it had been a light load." (T. 65.)

This witness is mistaken when he says that it was an average load, as he admits that he did not see the accident. (T. 64.) He was there using "them particular kinds of ringbolts." (T. 28.) This probably explains why he did not object to plaintiff using them, but hurried him up.

We have already shown that there were two witnesses who testified that it was a light load. (T. 32 and 45.) Since it was the duty of the mate to see that the bolts were safe, we cannot blame the plaintiff for acting quickly when this mate came and said:

"You people are too slow; put that load in there." And he did not give the plaintiff time "to rig up anything." (T. 38.) The master on the vessel knew that the bolt was not clamped, and he knew that the bolt was simply screwed down, but he did not tell Sporgeon about that. (Testimony of the master, T. 52.) The only place where the plaintiff

had seen such ring-bolts screwed down was on the ship's forecastle heads. (T. 39.) Such a bolt without a nut, known as a lag screw, is very liable to work loose. This was explained by witness Becker on his cross-examination as follows:

"And when you tip it over and pull on it the other way, in turn, you would ream the hole out, and the bolt would come out, or if the wood held you would break the bolt off, *you would require only one quarter of the stress* that is in a direct pull. The bolt might turn if the stress on the line was sufficient, not with short leverage. If the force was sufficient it might finally come out by itself." (T. 63.)

When it is remembered that the plaintiff used this ring-bolt not to unload the vessel, but simply to get the laths out of the way for the purpose of unloading the vessel, he does that which the master of the vessel said that he could do. The master testified:

"I would say you could use it for discharging a load or two like he did." (T. 50.)

Lauritzen also said the same. He said:

"I have been a winchdriver for many years and I saw them use this particular bolt in many places the same as it was used that time. It was nothing unusual, and they usually lead it the way it will lead best, and they do not stop to make inquiry, if the bolt is fastened enough." (T. 22.)

It was the first load that Lauritzen picked that injured the plaintiff. (T. 22.)

There was conflict in the testimony, if the bolt was properly fastened, and there was conflict in the testimony, if the bolt was improperly used.

The improper fastening of the bolt was shown by the following witnesses:

Witness Ainsworth. (T. 40.)

Witness Sporgeon, plaintiff. (T. 39.)

Witness Moriarity: "there are several ways of fastening such a bolt, some have a shoulder, and you screw them in, underneath they sometimes put a washer or a grummet to prevent leakage. Evidently there was no washer on that bolt."—"A man on the deck cannot tell how it is fastened below."

Witnesses for the defendants testified to the contrary.

The master said: "A bolt of this kind is a common thing on board such vessel." (T. 50.)

Witness Cleaver said: "These bolts are commonly used on steam schooners." (T. 53.)

Witness Lancaster: "It is proper and customary to put lag screws in for that purpose." (Lashing cargo.) (T. 55.)

Witness Becker testified strongly for the defendant but he also said: "A lag screw is not a common equipment on such schooners."

Witness Ole Grande, the mate, did not say one word as to the proper or improper method of fastening the bolt (T. 63), and still it was his duty to see that everything was safe. The managing owner

said: "The mate would have to know if the bolts and screws were not in shape." (T. 71.)

CONFLICT IN TESTIMONY AS TO THE METHOD OF DOING THE WORK.

The following witnesses testified that the plaintiff followed the proper method when it came to move a light load. And it is important to bear in mind that the vessel was not discharging cargo, but at the time of the injury the vessel was getting ready to discharge cargo and for that purpose plaintiff moved a small load of laths from the hatch.

Witness Oscar Sporgeon, the plaintiff. (T. 28.)

Witness Ainsworth (T. 41) said, "it is a common practice but not a good practice."

The master said: "I would say you could use it for discharging a load or two, like he did." The mate used such bolts. (T. 28.)

Witness Lauritzen: he "saw them use this particular bolt in many places the same as it was used that time. They usually lead the way it will lead best." (T. 22.)

At the end of the testimony the court granted a directed verdict, and from the records it appears that the court had forgotten especially the testimony of witness Laurtizen to which his attention was especially called when the plaintiff's attorney asked for an exception.

The attorney for the plaintiff said:

"The plaintiff excepts to the ruling of the court for the following reasons: That the testimony is in conflict, and especially the testimony of witness Lauritzen, that the work had gone on while he was a winchman. He was an eye-witness, and he said the bolt was used for that particular purpose, and we ask for an exception.

The COURT. Take the exception as noted, although the counsel has misstated Mr. Lauritzen's testimony."

Lauritzen testified that it was "the first load I picked up. He had been a winchdriver for several years and that they generally lead the way it will lead best.

Q. And saw them use this particular bolt in many places the same as it was used that time, it was nothing unusual?

A. They usually lead the way it will lead best." (T. 22.)

It is strange that the plaintiff can be said to have used the ring-bolt in an improper manner when the master on the ship testified that it could be used for a load or two even for discharging.

The master said: "I would say you could use it for discharging a load or two, like he did." (T. 50.)

The testimony was that the matter of safety was left to the mate. This was shown both by the master and by the owner, and the bolts had never been inspected, as that was no part of the government's duty. (T. 71.)

ARGUMENT AND AUTHORITIES.

We think that Rule 93 of the rules of this court has the correct idea about when a directed verdict may be directed. This rule of court reads:

> "either party to an action at law tried with a jury, may at the close of the evidence on both sides, move the court for an instruction to render a verdict in his favor, and if the case be such, that assuming in favor of the opposite party everything which the evidence tends to prove, to-wit, everything which the jury might properly infer from it, nevertheless, he has, as a matter of law, no cause of action or defense, as the case may be, the court must grant the motion."

POINT ONE.

When the evidence is in conflict, it is a matter for the jury and not for the court, and if the testimony is such that reasonable men might differ it is for the jury to decide the facts.

In *Burch v. Southern Pacific R. R. Co.,* 32 Nev. 75, 104 Pac. 225, 1912 B. Ann. Cas. 1160, the court says:

> "The rule is well established in this and other courts that in considering the granting or refusing a motion for a nonsuit the court must take as proven every fact which the plaintiff's evidence tends to prove, and which was essential to his recovery, and every inference of facts that can legitimately be drawn therefrom, and give to the plaintiff the benefit of all legal presumptions, arising from the evidence and interpreting the evidence most strongly against the defendant."

The Supreme Court of California, in *Hanley v. Cal. Bridge and Construction Co.,* 127 Cal. 237, 59 Pac. 577, 47 L. R. A. 597, says:

> "In actions, like the present one, questions of negligence are for the jury to determine: and it is only when the facts are undisputed, and are such that reasonable men can draw fairly only one conclusion from them, that the question of negligence is ever considered one of law for the court."

The above is still the rule in California, as we can see from a late work, 9 *Cal. Jur.* 558, where it is said:

> "It (the court) should deny a motion for a nonsuit, even where there is a conflict in the evidence and some testimony tends to sustain plaintiff's case, or where the evidence of the plaintiff is such that different conclusions can reasonably be drawn therefrom. If there is any doubt, it is the duty of the court to let the case go to the jury."

On page 563 of Vol. 9 *Cal. Jur.,* the same author says:

> "In other words, when once a plaintiff has adduced such evidence as if uncontradicted would justify and sustain a verdict, no amount of contradictory evidence will justify the withdrawal of the case from the jury. Whenever a plaintiff proves a state of facts from which a presumption arises, such a presumption is evidence, which, even, if disputable is sufficient to support a finding in accordance therewith notwithstanding there may be evidence to the contrary. Therefore the mere fact that the defendant introduces evidence in conflict with the

presumption does not dispel it so as to entitle him to a nonsuit. Whether the presumption has been controverted is a question for the jury."

9 *Cal. Jur.*, 563.

JURY TRIAL HAS BEEN GRANTED TO SEAMEN.

On June 5, 1920, Congress passed a law to the effect that a seaman should have the same right as an employee of an interstate common carrier, and a jury trial. This section reads as follows:

"Any seaman who shall suffer personal injury in the course of his employment may, at his election maintain an action at law, with the right of a trial by jury and in such action all statutes of the United States, modifying or extending the common law rights or remedy in cases of personal injury to railway employees shall apply," etc.

7568 Comp. Stat. of the U. S., Amending the Act of March 4th, 1915.

The Railway Employees statute which is adopted, reads as follows:

"Every common carrier by railroad while engaged in commerce between any of the several States or Territories, or between any of the several States or Territories, or between the District of Columbia, or any of the States or Territories, and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce," etc. * * * "for such injury or death resulting in whole or in part from the negligence of any of its officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence,

in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Law of April 22nd, 1908, 35 Stat. 65.

The above section mentions two different kinds of negligence: One is the negligence of a fellow servant, and the second is the negligence "by reason of any defect or insufficiency in its cars, engines," etc.

The plaintiff proved in the case at bar negligence of a fellow servant as well as negligence in the appliances as follows:

(I) Negligence of a Fellow Servant:

(a) The master of the vessel knew that the bolt was not clamped, but simply screwed on and did not tell Sporgeon about it. (T. 52.)

(b) The negligence of the mate who said, "You people are too slow," and did not give the plaintiff "time to rig up anything." (T. 38.)

(c) It was the mate's duty to inspect the bolts, and there had been no inspection, so far as we know, for seven years. (T. 70.)

(d) If it is a fact that the plaintiff was negligent in using the ring-bolt he was negligent by order of his superior, whose orders a seaman must obey, and because his superior used that kind of bolts. This is shown by the following testimony of plaintiff:

Plaintiff testified:

"I was busy, and I walked aft again, the chief officer and third officer were aft using them particular ringbolts loading the ship." (T. 28.)

"Q. Just a minute. Do we understand that you say that the ringbolt that you now mentioned was used in the same way, as you had used it by everybody else on the ship?

A. Yes, sir." (T. 28.)

(c) Grande, the chief officer was negligent in not giving the plaintiff a snatch-block. (T. 28.) There were three snatch-blocks on the vessel. (Testimony of the master.) (T. 52.)

"The force of the ringbolt would have been reduced 25% by the introduction of an ordinary snatch-block." (Testimony of Mr. Becker, for the defense.) (T. 61.)

(II) Negligence in the Equipment:

The railroad employees liability law which has been made applicable to seamen makes the employer liable also for an injury by "reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or any other equipment." Negligence in the equipment was proven:

(a) "In order to make a bolt solid so it will not come out or work loose one way is riveting it over a washer, one by putting a nut over a washer, and one by putting a key through it over a washer."

Plaintiff testified:

"The difference in fastening—seamen, sir—do not use that kind of bolts on a ship for any purpose whatsoever, for heaving, or lashing or holding, be-

cause that bolt is unsafe to be on board a ship." (T. 31.)

The testimony of the plaintiff is corroborated by witness Moriarity who said:

"A bolt like that, with such awful small threads wouldn't have any hold at all, but this cannot be told from the way it is screwed in." (T. 43.)

A Verdict Directed For the Plaintiff Would Have Been Justified.

Ole Grande was the chief officer who gave the order to plaintiff and who did not give the plaintiff time to get the snatch-blocks. (T. 29.) This is not denied in the testimony of the chief officer. (T. 63.) He was the first mate who cursed and swore at plaintiff because the lumber was not moving fast enough. Witness McFadden testified: "In the meantime the first mate had come around, and cursed and swore at the second mate (plaintiff) because the lumber was not coming fast enough." (T. 45-56.) It was the duty of the same officer to see that everything was safe on the "deck-department." This appears from the testimony of the managing owner, Mr. Mahoney, as follows:

"We leave it to the captain to look after the deck-department, he in turn instructs the mate, if there is anything wrong, to report to him, and he in turn reports to the superintending engineer, who is a practical man, and he goes and looks her over." (T. 70.)

True it is that the mate said, "I did not give him any instructions as to the use of an eye-bolt" (T. 64), but the mate spoke about a heavy load of planks which he must have had in mind and not the small load of laths which constituted the load that was lifted when the injury happened. This appears from the following:

"It was a load of planks, 2 by 3 by 4, and they are sometimes heavy, and there must have been a strain on to pull it out. The strain would not have been near as great, if it had been a light load." (T. 65.) The mate said, "I did not see the accident, I first heard of the accident an hour afterwards." (T. 64.)

Now since this very mate had charge of the safety of the deck-department, and since the mate does not deny that the plaintiff told the truth when plaintiff testified that he asked for snatch-blocks and the mate did not give him any, it shows that if the plaintiff had asked for a directed verdict the court would have been justified in granting the demand. We are aware of that since the plaintiff did not ask for such a verdict we cannot at this time complain that it was not given. But our contention is that the testimony is all one way, and that the court erred in granting any directed verdict for the defendant, since there was no defense shown to the plaintiff's testimony. This argument is correct only on the theory that the doctrine of assumption of risk and contributory negligence are no defenses in an action when a seaman acts under orders.

In the case of *Grimberg v. Admiral Oriental Line,* Judge Cushman, July 7, 1924, 300 Fed. Rep. 619, the court held that a seaman is not assuming the risk as it is generally understood. In that case the injury was due to the fact that the plaintiff tripped and fell over an iron bar holding down a tarpaulin over the hatch cover, which was negligently not fastened. The court uses the following language:

> "In the present case it has been argued that the risk of the injury from the cause described was assumed by plaintiff. Employers' Liability Act of 1908, Sec. 4 (Sec. 8660, Comp. Stat.), provides that an employe—
>
> 'shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe.'
>
> The effect of this was to leave the general defense of assumption of risk. Seaboard Air Line Railway v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1 Ann. Cas. 1915B, 475. supra. It therefore follows that an injured seaman must he held to have assumed the risk of injury from any and all those dangers ordinarily and naturally incident to the service in which he engages; but it cannot be that Congress intended to make applicable to seamen the entire doctrine of assumption of risk, as the same has been developed under the law of railway carriage. This necessarily results from the difference in the terms of the two employments. The servant or employe on shore is free to quit at will his employment, if there appear to him dangers in it; this the seaman cannot do.
>
> The seaman, for desertion, forfeits not only the wages he has earned, but the clothes and

effects he leaves on board. For neglect of duty he is subject to forfeiture of part of his wages. For willful disobedience to lawful command he is not only liable to forfeiture of part of his wages, but to be placed in irons, as well; for continued willful disobedience to lawful command, he is not only subject to penalties and punishment similar in kind, but to be put on bread and water, with full rations every fifth day. Section 8380, Comp. Stat. The seaman's neglect of duty or refusal to do a lawful act, under certain circumstances, subjects him to imprisonment. Section 8383, Comp. Stat. Not only under the law, by refusing to do the work required of him, does he incur the risk of forfeiture and punishment, but during the voyage he is physically unable to leave the ship.

The seaman does not assume the risk of injury resulting from the unseaworthiness of the vessel, defective appliances, or a place to work not made reasonably safe, although with knowledge of the danger he continues in the employment. Cricket S. S. Co. v. Parry (C. C. A.), 263 Fed. 523, at 525 and 526, certiorari denied Cricket Steamship Co. v. Parry, 252 U. S. 580, 40 Sup. Ct. 345, 64 L. Ed. 726. The danger of injury because of negligence, if any, in failing to provide means to fasten the iron bar in place, the plaintiff would not assume. Cricket S. S. Co. v. Parry (C. C. A.), 263 Fed. 523, supra. If there was no negligence in the foregoing respect, and the iron bar was either negligently placed in the position described, or negligently permitted to get and remain in such position, which negligence was that of an officer of the ship or member of the crew other than plaintiff, the plaintiff would not, without more, assume the risk of injury arising from such negligence; for the Employers' Liability Act and the La Follette Act both abolish the defense of a fellow servant's negligence."

In *Lynot v. Great Lakes Transit Co.,* 195 N. Y. Suppl. 13, citation from page 19, the Appellate Division of the Supreme Court in N. Y. says:

> "Here, however, the action is under the maritime law and not under the common law and the rule in respect to assumption of obvious risks is not a part of the general maritime law.
>
> "The seaman must obey orders and submit himself to punishment for wilful disobedience. Eldridge v. Atlas S. S. Co., 134 N. Y. 187, 32 N. E. 66. He cannot quit his job without becoming a deserter. Malukas v. Overseas Shipping Co., 197 App. Div. (N. Y.) 224, 189 N. Y. Suppl. 13. Even though the defective appliance is known to the seaman where he ships, he does not assume the risk of injury therefrom, but may rely upon the defect being corrected. Cricket S. S. Co. v. Parry, 263 Fed. 523. In short, a vessel's owner who sails his ships with improper appliances, does so at his own risk, and not at the risk of the seaman. Sec. 33 of the Merchant Marine Act expressly granted to sailors the right of the employees under the federal employees liability act, but the causes of action of seamen are still causes of action under the maritime as distinguished from common law, and must be governed by its established rules."

The court held that Sporgeon was entirely to blame for his accident, and the court said about him: "There is no testimony that any one directed him to select this particular way." (T. 75.) The court must have forgotten the testimony of plaintiff who said, "There was another way of doing it, if the mate would have given me time to rig up the gear." (T. 73.) This is not denied by the mate in all his testimony which appears on pages 63 and 65.

The mate testified:

"I did not direct him to put up the lines, he knows that much himself. I gave him instructions to move it aft, but not how it should be done, he knows that much himself. That was left entirely to him. I did not give him any instructions as to the use of an eyebolt." (T. 64.)

The load that the mate speaks of is a load of planks, 2 by 3 by 2 by 12. (T. 65.) But the load that was actually on the sling when the accident happened was a light load of laths. That was the uncontradicted testimony of all witnesses who saw the accident, and the master of the vessel said: "I would say you could use it (the ringbolt) for discharging a load or two." (T. 50.) "It had been used for that purpose when the laths were put on board," said plaintiff. (T. 73.)

The same said Lauritzen, an eye witness, and a member of the crew. (T. 22.)

Only "experts" who did not see the accident said that the ring-bolt was "not intended for that purpose."

It is not denied that Sporgeon was cursed and sworn at to hurry up. (Testimony of McFadden 64, as well as of plaintiff.) "There was another way of doing it, said plaintiff, if the mate would have given me time." (T. 73.)

The above is not denied by any witnesses. Defendants' witnesses said the plaintiff used a wrong

method, and the court so found, and that was the reason for a directed verdict. But we claim it was error, indeed so great an error it was that a directed verdict in plaintiff's favor would, if asked for and granted by the court, have been proper.

The reason is this:

THAT WHEN A SERVANT, ON SHORE OR ON A VESSEL, IS ACTING UNDER ORDERS, HE DOES NOT ASSUME THE RISK, AND IS NOT GUILTY OF ANY NEGLIGENCE. There is no greater authority on master and servant than Labbatt. In Second Ed. of his work, Master and Servant, Sec. 923, page 2465, Vol. 3, he says:

> "The master's acquiescence in the use of an appliance for some purposes other than that for which it was intended puts him in the same position as if the appliance had originally been furnished for that purpose." (Cases cited.)

Again the same author says:

> "In many cases the language of the court implies that were the injury received in obeying a direct command, all question of assumption of risks is eliminated. and the master must rely solely on the plaintiff's contributory negligence. The rationale of this view is that, by giving a direct command to perform the work, the master takes upon himself the risk which otherwise would be assumed by the servant. In a large number of cases the rule is stated to be that if the servant is injured while obeying a direct command he will not be held to have assumed the risk."
>
> *Labbatt, Master and Servant,* page 3921, Sec. 1362, Second Ed.

If the plaintiff had known that a bolt which was supposed to hold between 5,000 and 50,000 pounds (T. 62), was so loose that to use the testimony of plaintiff, "that it was just like it slid out," nevertheless under the decision of the case of *Grimberg v. Admiral Oriental Line,* 300 Fed. 619, he did not assume the risk, since a seaman must obey orders. On page 3927, Sec. 1363, Second Ed., Labbatt says:

> "For reasons explained in paragraphs 1207, 1233, it is plain that negligence cannot be predicated of a servant's obedience to an order, where he had no knowledge actual, or constructive, of the dangerous condition to which such obedience would expose him."

The doctrine announced in the case of *Grimberg v. Admiral Oriental Line* (supra), is not a new doctrine. About the assumption of risk, so far as seamen are concerned Labbatt says:

> "On the other hand, it is well settled that no such voluntary quality can be ascribed to their conduct in continuing to expose themselves to abnormal risks which come to their knowledge while their contract is being carried out. The rationale of this exception to the general rule is that they are bound by their shipping articles to strict obedience, that they are subject to severe penalties if they refuse to perform their duties, and that they have not the option, which landsmen are theoretically supposed to possess of abandoning the employment the moment they are exposed to an abnormal risk. Lafourche Packet Co. v. Henderson, 36 C. C. A. 519, 94 Fed. 871."

> "Obedience to officers is the necessary law of the ship; disobedience is criminal. The Frank & Willie, 45 Fed. 494."

To the same effect is *Bailey on Personal Injury,* page 403, Sec. 173, and the following cases:

Panama R. R. Co. v. Johnson, 264 U. S. 375;

The Colusa, 248 Fed. 293, 9th C. C. A.;

Lafourche Packet Co. v. Henderson, 94 Fed. 871;

Lynot v. Great Lakes Transit Co., 202 Ap. D. 613, 195 N. Y. Sup. 13, affd. 138 N. Y. 473.

The motion for a directed verdict (T. 73) does not tell us, if the defendants relied on the doctrine of assumption of risk or contributory negligence. Thus says the court:

> "There is no testimony that anyone directed him to select this particular way. He did it of his own volition. He could have rigged slings at other places with blocks, to give him the purchase that he desired, that would bring his lines in the orderly arrangement that would be necessary to move his lumber, but instead of doing it, he chose this particular way, and he runs the rope through this ringbolt, that was on the floor of the deck of the ship." (T. 75.)

The testimony of the plaintiff is entirely overlooked by the court. Plaintiff said: "There was another way of doing it, if the mate would have given me time to rig up the gears."

The court said: "He (the plaintiff) could have rigged at other places with blocks."

That is what the court said, but the plaintiff said, and I do not think it was ever controverted as follows:

"After twelve o'clock I went to Mr. Grande (the mate) and said: 'Are there any snatch-blocks on the ship? I can't find any.' He said he would be blessed, if he knowed, he hadn't seen any." (T. 28.)

A block would have reduced the strain 25 per cent. Testimony of Becker. (T. 61.)

The whole testimony of the defense is based on the supposition that the ring-bolt was intended for lashing, especially booms.

But when we remember that the greatest stress that was ever applied on the light load was not more than one twenty-fifth of what it was supposed to hold, we can easily see that the bolt could not even be used for the lashing of a boom, because a boom also has weight. Indeed an ordinary boom will weigh tons, and when the wind blows and throws the ship from side to side, the strain no doubt would be more than 1250 pounds, if it was any boom at all. This ring-bolt just "slid out", said the plaintiff. It was supposed to hold from 5,000 to 50,000 pounds (T. 62), and no doubt 50,000 pounds resistance was calculated to be sufficient in the event that it was used for lashing booms, but we can easily understand that when this slight pull made it come out that it was not in a safe condition for anything.

All "experts" testified that this ringbolt was used for lashing, and not when loading, and it is most remarkable that not one witness on the ship related a single instance when the bolt had been used for lashing, but those on the vessel could show that this bolt had been used for loading.

The witnesses for the defendants all knew what the government intended to use this bolt for, that is they claim they knew, but it looked strong and solid to the plaintiff who did not know that it was not clenched below like all other bolts that he had seen, and he had no time to think, but it was his duty to obey quickly, and it is unjust in the extreme to say that he assumed the risk of something he knew nothing about.

If the gear had not been properly rigged up the mate would not have cursed plaintiff and told him to hurry up. We have no right to reason that the mate, if he had seen that there was something wrong in the way the gear was rigged up, and known that it was dangerous, that he would then hurry the plaintiff. It must be true as the captain said, Lauritzen said, and the plaintiff said that they used this lead for a load or two, a light load.

It is unreasonable to argue that the owner of the vessel has no more duty than to properly rig it up in the first place. His duty is a continuing duty to see that the appliances are safe for the purpose for which they are used on the vessel.

The rule of law is that for defective appliances both the vessel and her owners are liable. It is well stated in 36 *Cyc.* 162, as follows:

> "It is the duty of owners of a vessel, which they owe to persons on a vessel who may be rightly upon or near their vessel and to all who may be affected by her use, to use reasonable care and skill to keep the vessel and her appliances in a reasonably safe condition, and if they fail to do so, they and their vessel are liable for damages caused to person or property by the dangerous or defective condition of the vessel, or of her appliances."
>
> 36 *Cyc.* 162.

35 *Cyc.* 1245 uses this language:

> "But the liability in such cases is incurred only when those who represented the vessel failed to exercise reasonable care to make the fittings or appliances safe, and when the breakage was due to a defect which might with reasonable care have been discovered or remedied."

Now, this defect in the fastening of the bolt which was so loose that it "just slid out" could easily have been discovered by the mate whose duty it was to look out for such matters. Indeed the master knew the manner in which it was fastened, it was not clenched, but only screwed in. The master said: "I knew it was not clamped, and I knew it was screwed down the deck." (T. 52.)

Neither the counsel who made the motion for a directed verdict nor the court classified the act of plaintiff either as contributory negligence nor as assumption of risk. The court said that it was

plaintiff's own fault. Plaintiff "was injured by his own indiscretion." (T. 77.)

We believe that the court was of the opinion that the plaintiff was guilty of contributory negligence rather than of assumption of risk. If his negligence was contributory negligence it was for the jury to determine the amount, or to use the language of the statute, to "apportion" the negligence of each.

Judge Taft, as we will see in the following page, points out a distinction between assumption of risk and contributory negligence. Since there is no such thing as assumption of risk, except ordinary risk, that can be used as a defense against a seaman, we must heartily cite from *Bailey* on *Personal Injuries,* Vol. 2, page 949, what the Supreme Court of the United States says. Their say is law right or wrong, Bailey says:

> "Where an adult was injured while letting himself down from a car, having forgotten that one of the steps was missing, and the court failed to observe any other consideration, as being involved than that of contributory negligence, it was said: 'We are of the opinion that the court erred in not submitting to the jury whether the plaintiff, in forgetting or not recalling at the precise moment the fact that the car from which he attempted to let himself down, was one from which the step was missing, was in the exercise of that degree of care and caution which was incumbent upon a man of ordinary prudence in the same calling and under the same circumstance under which he was placed.' Kane v. Railway Co., 128 U. S. 94.

> Assumption of risk as extended to dangerous condition of machinery, premises, and the like, obviously shades into negligence as commonly understood. The difference between the two is one of degree rather than kind. Schlemmer v. R. & P. R. Co., 205 U. S. 127, Sup. Ct. Rep. 407, 51 Law Ed. 681. See also Schlemmer v. Buffalo R. & P. R. Co., 220 U. S. 590, 31 Sup. Ct. Rep. 561, decided May 15, 1911."

We find the following note in Sec. 354, page 949, in Vol. 2 of *Bailey* in his work on *Personal Injuries* where he cites Taft, as follows:

> (Note 29.)
> "Assumption of risk and contributory negligence are neither identical in effect or co-incident in extent. Assumption of risk is the voluntary contract of an ordinary prudent person to take chances of the known or obvious dangers of their employment, and to relieve his master of any liability therefore. Contributory negligence is the casual action or omission of the servant without any ordinary care or consequences. The one rest in contracts the other in tort. Narramore v. Railroad Co., 96 Fed. Rep. 298, 37 C. C. A. 499, 48 L. R. A. 68."

If all the evidence on the part of the plaintiff is disregarded, as we believe the lower court did, we find this situation: There is no proof of any inspection as to the bolt for years. It was supposed to hold between 5,000 and 50,000 pounds or at least two tons and a half (T. 62), and was pulled out according to the testimony of the defendants' witnesses on a pull of about 2000 pounds, and according to plaintiff, "it just slid out;" this shows negligence

on the part of the owners of the vessel, as even their own witnesses said that this bolt was used for the same purpose as the plaintiff used it. If he was under the Merchant Marine Act, Sec. 33, his case should have gone to the jury. It could not be a case of assumption of risk, as the plaintiff was ignorant of the loose condition of the bolt. Since assumption of risks rest in contract, plaintiff cannot assume that of which he knows nothing, but according to the cases cited from the Supreme Court of the United States the difference between the two defenses are of degree rather than of kind, *Bailey, Personal Injuries,* Sec. 354, page 949.

When Sec. 33 of the Jones Act came before the C. C. A., 289 Fed. Rep. 964, the court also held that assumption of risk was no defense against a seaman when his cause of action grew out of defective appliances on the vessel.

Panama R. R. Co. v. Johnson, Aff. 264 U. S. 375, 68 Law Ed. .

Benedict on Admiralty, 5th Ed., Sec. 83, p. 135 says:

> "The risk of improper appliances furnished by the owner is not assumed by the seaman who is bound to obey orders and the principle is applicable in an action at law as it is in admiralty."

We think the lower court who granted the directed verdict may have been induced so to do by reason of his idea of what the law was with refer-

ence to the care required of a shipowner in regard to appliances on a vessel. The court said:

> "The duty of the owner of a ship is the same as that of any other, that is to say, he must use and exercise ordinary and reasonable care, to make the place and the instrumentalities with which the seaman works reasonably safe." (T. 74.)

But reasonable care in this instance is greater than ordinary care of a landsman. That was overlooked by the court.

Benedict in his work on *Admiralty,* page 135, says:

> "The shipowner is held to a higher degree of care than an employer ashore."
>
> *Storgard v. La France & Canada S. S. C.,* 263 Fed. Rep. 545, certiorari denied, 252 U. S. 585, 40 Sup. Ct. Rep. 394.

The plaintiff, Sporgeon, did not know that the bolt was improperly fastened, and did not assume the risk of such unknown dangers. This is the rule in cases where the railroad employer's liability law applies, as it is well said by Justice Lamar writing the opinion for the Supreme Court of the United States in *Central Vermont Railroad Co. v. White,* 238 U. S. 507, 9 Neg. & Comp. Cases, 265, where it is said:

> "He (the deceased) did not assume the risk arising from unknown defects, engines, machinery, or appliances, while the statute abolishes the fellow servant rule. 35 Stat. 65, No. 2."

The answer of the defendant in the case at bar is well drawn. It sets up two distinct defenses, negligence on the part of plaintiff and assumption of risk. In the second affirmative defense the defendants plead that:

"The plaintiff carelessly and negligently caused 'a line to run through a certain eye-bolt fastened to the deck and then pulled away to the right and at an angle, and by reason of the *failure to use a block in connection with said eye-bolt, said bolt was subjected to an enormous and severe strain, etc.' That there were available plenty of blocks for plaintiff's use had he so elected to use them but he failed and neglected to do so although he knew or should have known that he thereby subjected said bolt to a strain far beyond that which it was intended to bear.*" (T. 12.)

The same is repeated by the defendants in the fifth defense as follows:

"The plaintiff was negligent" etc., "in his failure to use a block in connection with the rope running through the eye-bolt." (T. 15.)

These blocks should have been used said the defendants, but they were not available, and plaintiff's testimony must be taken to be true, since it is not rebutted.

The mate's testimony is on pages 63-64 and 65 of the transcript, and not a word is said by which he denies that Sporgeon made a request for a block.

All the witnesses agree that snatch-blocks should have been used, and since these could not be found it is so much more peculiar that the court could say that the accident was simply the "fault of the plaintiff."

From the answer as well as from the testimony we draw the conclusion that plaintiff was held guilty of negligence, because he did not use a snatch-block. If there had been any testimony to the effect that plaintiff by not using the snatch-blocks submitted the eye-bolt to an enormous strain, this would have been no defense under the testimony which was to the effect that the mate did not let him have any. But it is not true that the eye-bolt was submitted to an enormous strain, or even to an ordinary strain, as we have already shown, therefore we would have been entitled to a directed verdict in our favor, if we had asked for it. The worst that can be said against plaintiff is that he was guilty of contributory negligence, but that would not defeat his recovery, neither is it fair to say that his negligence was the sole cause of the accident, especially when the following facts are considered, namely the ring-bolt was loose, and the order by the mate telling plaintiff to hurry up and refusing him the snatch-blocks. It is well said by Hallam in the case of *Otos v. Great Northern R. R. Co.,* 128 Minn. 283, 150 N. W. 922:

> "Defendant contends that the proximate cause of plaintiff's injury was not the defective condition of the coupling, but his violation of a

> rule of the employer forbidding employees to go between moving cars. It appears that there was such a rule. There is evidence that in this yard it had with knowledge of the yardmaster, been more honored in its breach than in its observance. But, whatever may be said of the propriety of plaintiff's act in going between the cars, it was only one of the concurrent causes of plaintiff's injury. The violation of the statute was one cause of his injury. Turritan v. Chicago, St. Paul M. & O. Ry. Co., 95 Minn. 408, 18 Am. Neg. Rep. 506; Sprague v. Wisconsin Central Ry. Co., 104 Minn. 58, 116 N. W. 104. This is all that is necessary to create liability. The statute which abolishes contributory negligence 'would be nullified by calling plaintiff's act the proximate cause, and then defeating him, when he could not be defeated by calling his act contributory negligence. * * * It is only when the plaintiff's act is the sole cause—when the defendant's act is no part of the causation, that the defendant is free from liability under the act. Grand Trunk Ry. Co. v. Lindsay, 233 U. S. 42, 34 Sup. Ct. Rep. 581, 582, 58 Law. Ed. 836, Anno. Cases 1914 C. 168, quoting 201 Fed. Rep. 844, 120 C. C. A. 166."

The plaintiff testified that the mate who was the vice principal would not give the plaintiff time to rig it up. This is not denied. There is testimony to show that the plaintiff rigged up the load contrary to custom, but no denial of the fact that in this case plaintiff was acting under orders, he, plaintiff said: "There was another way of doing it, if the mate would have given me time to rig up the gears." (T. 73.)

A snatch-block was refused the plaintiff.

All witnesses testified that a snatch-block should be used. The captain said: "If you had a snatch-block on a bolt, this would eliminate a certain amount of the strain on the rope itself." (T. 51.)

Witness Becker for the defendant worked it out mathematically, the reduction of stress an ordinary snatch-block would have caused. (T. 60.) It would have reduced the stress 35 per cent. (T. 62.)

The "deck-department" was left to the mate to take care of. (T. 70.) It is impossible to find any trace of any negligence on the part of the plaintiff, but the record is replete with facts showing negligence on the part of those who represented the vessel. Some of the facts are:

(1) Want of inspection about the bolt;

(2) Refused to give plaintiff time to rig up the lines;

(3) Refusing him a snatch-block.

But the mate said:

"I did not direct him how to put up the lines, he knows that much himself. That was left entirely to him. I did not give him any instructions as to the use of an eye-bolt. I did not see any of the operations of moving this lumber aft."

This is no denial of the fact that he was cussing and swearing because the lumber did not come fast enough. (T. 46.) Neither does it deny the fact that this mate refused plaintiff a snatch-block. (T. 29.)

The following is a note we find in *Labbatt, Master and Servant,* Second Ed., page 4804, Sec. 1582:

> "The master cannot escape liability upon the ground that the negligent methods were adopted by a fellow servant, where the superintendent was present a sufficient length of time before the accident to have made a change of methods. Hamann v. Milwaukee Bridge Co., 127 Wisc. 550, 106 N. W. 1081, 7 Ann. Cas. 458."

We have already seen that a seaman must obey orders and that the doctrine of assumption of risk and contributory negligence does not apply in such cases.

This ring-bolt became so loose that according to plaintiff's testimony it "just slid out" and according to the most favorable testimony on behalf of the defendant it should have stood a strain of from 5,000 to 50,000 pounds. Thus said witness Becker for the defendant:

"Looking at this bolt, the defendant's exhibit 1, it is a 7/8 inch bolt, in good material or a straight pull that bolt would hold about 50,000 pounds, at least two tons and a half." (T. 62.)

Just imagine the idea of accusing plaintiff to be at fault for submitting such a bolt to a weight of between 1200 and 2000 pounds. The very fact that this bolt became loose, if it was not already loose, shows negligence on the part of the mate whose duty it was to look after the deck-department. (T. 71.)

In *Heinz v. Knisely Brothers,* (1914) 185 Ills. Appellate Court 275, the court says:

> "From the fact that the rope broke, the jury might properly find it was not strong enough to withstand the strain put on it, and that the weakness of the rope manifested itself by the 'fuzzy' condition."

In our case a witness, Mr. Becker, who was called as a witness for the defendant testified:

"The bolt might turn, if the stress on the line was sufficient, not with short leverage, but it might with a long leverage. If force was sufficient it might finally come out by itself." (T. 63.)

Any person can understand that a bolt with no nut or other appliance to keep it from coming out, will, when hit by lumber finally come out. The threads itself when turned will cause it to be loose. (T. 63 and the court's opinion T. 76.)

It was such a bolt that the captain on the vessel admitted that it could be used. He said:

"I would say you could use it for discharging a load or two like he (plaintiff) did."

The master says "LIKE HE DID." It is no wonder that the mate did not object when plaintiff was using it for a light load, but on the contrary "came around, and cursed and swore at the second mate (plaintiff) because the lumber did not come fast enough." (T. 46. Testimony of McFadden.) The court said: "And if plaintiff took a chance and injured himself." (T. 77.) The mate used "them

particular ringbolts." (T. 28.) Therefore the statement of the court that the plaintiff "took a chance and injured himself" is not supported by proof.

The master of the vessel said on cross-examination: "If the bolt had had a nut below, or was clamped below, I am sure that it would have been more safe, perfectly safe so far as the bolt was concerned. I never told Sporgeon that this bolt was not clamped below the deck, because the bolts were never used for that purpose. * * * I did not tell Sporgeon where he could find the snatch-blocks." (T. 52.)

But this is contradicted first by the captain himself who said: "I would say you could use it for discharging a load or two, like he did" (T. 50), second by witness Lauritzen (T. 22), third by plaintiff who said: "They used those ringbolts loading" (T. 27, last line), fourth by Moriarity: "If it (the bolt) was available for that—time is a factor, and you make it fast to anything. You certainly would" (use it). (T. 43.)

The chief officer testified and could have denied this, if it was not true.

Witness Lauritzen who was the winchdriver and called by the plaintiff although he was originally a witness for the defendant said:

"Q. And saw them use this particular bolt in many places the same as it was used at that time; it was nothing unusual?

A. They usually lead the way it will lead best.

Q. And at the time, fastened the way it was, you took it for granted it was like any other bolt on the ship?

A. Yes, sir." (T. 22 and 23.)

Witness Becker for the defendant said:

"I found ringbolts of such nature; they are placed in pairs, and the impression I got of them was that they were there to secure booms at some *previous time.*" (T. 57.)

Mr. Becker says also as follows:

"You never use it (this kind of bolt) where there is an opportunity for a transverse pull, unless it is used in connection with a pie plate bolt." (T. 56.)

But he says: "Providing the lashing attaches to the bolt in such a way that you have a strain along the axis of the bolt, never have a transverse strain, that is of any magnitude." (T. 57.)

The same witness said: "If the force was sufficient it might finally come out by itself." (Becker's testimony T. 63.) There seems to be some contradiction in the above, because no force is necessary when it would come out by itself. The witness means that, if enough of these transverse pulls, it would work loose and come out by itself. It stands to reason that ninety per cent of all pulls and hits were transverse pulls, even if used only for fastening booms, because a vessel is moved sideways on account of the waves, and if struck by lumber it

would likely be hit sideways. In other words this bolt was sure to work loose, because not clenched.

This shows how exceedingly dangerous it to have a screw that has no nuts or is not clenched below deck. It happened that the pull when the plaintiff used the bolt was a straight pull. "It was pulled straight out," said witness Lauritzen. (T. 20 and 21.) It was just such a straight pull by which the bolt was supposed to hold between 5,000 and 50,000 pounds. (T. 62.)

Any person who has seen a lumber schooner loaded knows that there is lumber everywhere, lumber below, and lumber on deck. It is impossible to avoid hitting matters, such as bolts when lumber is discharged or loaded on. These hits and the continual transverse stress would tend to work out any lag screw, and since the master on the vessel knew that it was simply screwed down, and not clamped, he should have let plaintiff know that it was not clamped below deck. This he did not do. (T. 52.)

We can easily see that the reason for a directed verdict was the court's opinion in the following statements:

> "The construction of them (the ringbolts) would render them unsafe for that purpose (for loading and unloading). Every witness who has testified in this case has testified that it is bad seamanship for anyone to make use of the ringbolts for the purpose for which the plaintiff devoted them, because they are liable to turn or screw out and the friction is likely

to tear them loose, as was done in this case." (T. 76.)

The above, more than anything else, shows the dangerous character of the bolt. Therefore, if the plaintiff had known that they were not clamped below, and if he had had time to rig up the lines, and if he had not been refused a block, he would have been almost entirely to blame for the negligent manner of fastening the ring-bolt.

The judge was mistaken when he said: "Every witness who has testified in this case has testified that it is bad seamanship for any one to make use of the ringbolts for the purpose which the plaintiff devoted them." (T. 76.)

The court must have forgotten the following testimony. An old seaman, eye-witness Lauritzen said:

"Q. You have been a winchdriver for several years?

A. Yes sir.

Q. And saw the use this particular bolt in many places the same as it was used at that time; it was nothing unusual?

A. They usually lead the way it will lead best."

Witness Ainsworth for the plaintiff said: "One could not tell by looking at it, except from below, if this bolt was clinched under the deck. If a person sees a bolt of that size on the deck, they would use it for the purpose for which it would be necessary to use a bolt of that size." (T. 40.)

Witness Moriarity for the plaintiff said:

"Judging from the size of it I would moor the courtroom to it." (T. 43.)

"I would not consider it good seamanship to use a bolt without using a block." (T. 44.)

This shows again that when the mate refused the plaintiff a block that the mate was not following "good seamanship." This is so much more important considering the fact that it was the mate's duty to look after the deck-department. (Testimony of the managing owner, Mr. Mahoney.) He said:

"The mate would have to know if the bolts and screws were not in shape. He has charge of the upper end and reports that to his superior officer. * * * I told no one to look after these bolts." (T. 71.)

The court said:

"The difficulty with the plaintiff's case is that he has used the appliances intended for one purpose for another purpose."

The court is mistaken in the above. This vessel was not an ordinary vessel but it was one built in the war time when everything was built in a hurry. Without contradiction plaintiff testified:

"She was one of those war-time-built vessels. * * * the winch was level with the keel." (T. 27.)

Mahoney, the managing owner said:

"The vessel was built on the Pacific Coast, and sold to the French government during the war, and I bought it back for delivery in New York."

It is not reasonable that any person can be absolutely certain as what these bolts were intended for. Since the vessel was built during the war, it was built in a hurry. If it was built by the government, President Wilson was thinking more of the Kaiser than of a seaman. If it had been built under the direction of "The Railsplitter" he would have intended it to be safe for a seaman, but neither the college president nor Lincoln would place a bolt on a vessel that seemed to hold fifty thousand pounds when as a matter of fact it held next to nothing.

It cannot be that any person knew what this bolt was intended for, and the judge was greatly mistaken in relying on experts on that point and disregarding the testimony of the seaman who knew what it was used for.

The actual pull on the bolt that was supposed to hold from 5,000 to 50,000 pounds, at the time it "slid out" is calculated as follows:

The load weighed about 1000 pounds (T. 32), by not having the snatch-block it increased the pull 35 per cent. (T. 62.) The whole pull did not exceed 1350 pounds. The legal principle showing that such condition is negligence is well stated in

Duran v. Yellow Aster Min. Co., 40 Cal. Ap. 633.

The complaint alleged that a certain rope furnished by the defendant for plaintiff's use "was insufficient in size, weight and strength to sustain and hold the weight of a dump-car." The rope broke

and by reason thereof the plaintiff was injured. The court in its opinion says:

> "The evidence is undisputed that a new rope of the size and quality used is good for four thousand pounds dead weight on a vertical lift * * * it was stipulated that the weight of the truck and running gear of the car was one thousand six hundred pounds, and the weight of the bed independent of the running gear and truck was about one thousand two hundred pounds, making a total weight of two thousand eight hundred pounds. * * *"
>
> "There does not appear to have been any close inspection of the rope before it was used."

It appears that the rope broke under a strain of 2800 pounds when it was supposed to lift 4000. That in connection with the fact that a cut was shown in the rope was sufficient to let the case go to the jury, and the court says:

> "The rule is affirmed that when a thing which causes the injury is shown to be under the management of the defendant, and the accident is such, as in the ordinary course of things does not happen, it affords reasonable evidence in the absence of explanation by the defendant that the accident arose from want of care."

In the case of *Pacific-American Fisheries Co. v. Hoof,* the libelant was a watchman on a vessel and as he was in the act of stepping from the upper deck of the vessel to the lower he was injured because the cleats had been removed and the ladder slipped. Rudkin, C. J., wrote the opinion of the court (291 Fed. 306). The court says:

> "The duty of the master to provide a safe working place is a continuing one, and cannot be delegated. When the working place and appliances are unsafe it is no answer to say that they were rendered unsafe some previous time as already stated, the duty is a continuing one, and notice of the defect and danger will be imputed to the master where they could have been discovered by reasonable inspection, and by the exercise of reasonable care."

The court says in his opinion (T. 77): "The owner couldn't guard against it." Of course that was left to the mate, and Mr. Mahoney has so many vessels that it would be utterly impossible for him to do that in person. But the testimony shows how easy the mate and master could have guarded against it. The master knew the bolt was not clenched but screwed to the deck. (T. 52.) This he could have ordered changed before the accident, but it was changed too late, after the accident. (T. 47.) They all knew that it was liable to "turn or screw out and the friction is likely to tear them loose, as was done in this case." This is also from the court's opinion, and note how very easily these matters could "have been guarded against." (T. 76.)

Witness Moriarity said:

"A bolt like that, if the deck is wet, with such awful small threads wouldn't have any hold at all, but this cannot be told from the way it was screwed in." (T. 43.)

The above shows that the court was right when he said:

"Because they are liable to turn and screw out and the friction is likely to tear them loose, as was done in this case." (Judge Bourquin, T. 76.)

The winchdriver said: "It did not seem to be fresh material, you cannot expect it to be exactly like new, because the water is bound to seep in and weaken it from 1917 to 1924, seven years."

In the case of *Osterholm v. Boston and Mont. C. Copper Co.,* 107 Pac. 499, 40 Mont. 508, the servant knew the condition of the cage that was alleged to be defective and caused the injury because it did not comply with the statutory requirement. Judge Bourquin who tried the case in the lower court ordered a directed verdict in favor of the plaintiff because he believed that as a matter of law the doctrine of assumption of risk did not apply, and that it was not a matter for the jury. When the case came to the Supreme Court of Montana that court reversed Judge Bourquin and said:

> "If, upon this latter question, different men of fair sound mind might draw different conclusions then the question must be submitted to the jury." (Citation from page 506 Pac. Rep.)

The court goes on and says:

> "In the case of Rase v. Minneapolis, St. Paul & P. S. S. M. Ry. Co., supra, Mr. Justice Jaggard said: 'It is clear that his appreciation of the risk was for the jury. He had no special occasion to animadvert to the possible danger. He had done his usual work with safety under the same condition. No peril necessary confronted him' etc. We think it was error to

> hold him to have assumed the risk as a matter of law, because as Ryan, J., said in Dorsey v. Construction Co., 42 Wisc. 583: 'The consequence of acquiescence ought to rest upon positive knowledge * * * of the precise danger assumed, and not on vague surmise of the possibility of danger.' "

Judge Jaggard, a great authority seems to take notice of the fact that the plaintiff had done his usual work with safety under same condition. In the case at bar, the mate did just as the plaintiff and used these bolts. (T. 28.)

In the case of *Schroeder v. Mont. Iron Works,* 38 Mont. 474, 100 Pac. 619, a chain broke because it was not large enough to hold the weight. Its size could be seen by the plaintiff who was injured by using it as well as by the defendant who had furnished it. Judge Bourquin who tried the case held that here was a clear case of contributory negligence as well as of assumption of risk, and he ruled against Schroeder and would not let the case go to the jury. A complaint, setting out that the chain was "insufficient in size did not state a cause of action, said the judge. The Supreme Court of Montana did not agree with Judge Bourquin on that point and the court speaking by Justice Brantley said:

> "Where a large number of men are employed upon the same work, it is essential that reasonable orders, regulating their conduct and assigning to them proper places in which to work, should be given. It is the duty and the right of the master to give orders and direct the

> places where his servants shall work. Their duty is instant and absolute obedience, unless it is obvious to them that such duty will expose them to unusual dangers. * * * A workman, when ordered from one part of a work to another cannot be allowed to stop, examine and experiment for himself, in order to ascertain if 'the place assigned to him, is a safe one'. This may with equal propriety be said of the appliances furnished by him to the servant. It is the master's duty to use ordinary care to furnish his servant with reasonable, suitable and safe appliances. The servant has a right to presume that this duty has been observed, hence his duty is to yield instant obedience in the use of them, and he will not be held to have assumed the risk of any unusual danger incident to such use, unless he knew of it, or it is so obvious that he must be presumed to have observed it."
>
> "Knowledge of the size of it would not imply such additional information."

In the case at bar the defendant will also argue that Sporgeon stood on the wrong side of the rope, and that this was negligence. So it would have been, if Sporgeon had known that the rope might break. About such a position standing under a chain that breaks the same court (*Schroeder v. Mont. Iron Works*) says:

> "Nor does this allegation justify the conclusion that he was guilty of contributory negligence in going near enough to the suspended casting to release the chain in order to complete the task assigned to him. If the chain had been of sufficient strength, it would not have broken. Plaintiff had a right to assume that it would not break."

The court reversed Judge Bourquin.

Reading the opinion of the Hon. Judge who tried the case of Sporgeon, we can easily see that he had the identical same idea at this time as he had in 1909.

We submit that the view that Justice Brantly took in the *Schroeder* case and Judge Rudkin in the *Hoof* case, is more just and humane. Not more than ten months ago this court held in *Petterson v. Hobbs-Wall & Co.,* 2 Fed. (2nd S.) 549, that even, if the testimony given by plaintiff may be hard to reconcile, still it should be left to the jury. Judge Dooling said in *"The Colusa,"* aff. 241 Fed. 968, that even if a defect in a turnbuckle was not obvious, it could have been discovered by the use of reasonable care. In support thereof *"The Fullerton,"* 167 Fed. 1, was cited. In *Carrado v. Pedersen,* 249 Fed. 165, Judge Dooling said when a man rope gave way, that safety lies only in frequent inspection. He says:

> "The shipowner's duty is positive and nondelegable to see that the ship is seaworthy and that her equipment is in condition for safe use."

In *"Santa Rosa",* 255 Fed. 231, Aff. 249 Fed. 160, the pulley and chain was not in good working order, it was held to be negligence, citing *"The Osceola,"* 189 U. S. 158.

In *Cricket Steamship Co. v. Parry,* 263 Fed. 523 a rope was not fit for use, held that the owners were liable.

> "Where the evidence offered by the plaintiff is reasonably sufficient to substantiate the claim of plaintiff, it is error to reject such evidence and direct a verdict for the defendant." Syllabus to the case of Cooper v. Spring Valley Water Co., 171 Cal. 158, 153 Pac. 936.

The right to grant a directed verdict is the same as the right to grant a non-suit. *Caspar Est. of,* 172 Cal. 147, 155 Pac. 631.

The court said in his opinion that plaintiff only was to blame, and the reason for this opinion was mostly the way plaintiff rigged up the gear and the fact that he used no snatch-blocks. As we have seen plaintiff "had no time to rig up anything" (T. 73), and he was refused snatch-blocks (T. 29), but if plaintiff's testimony could be eliminated nevertheless it should have gone to the jury. In the case of *"Joseph B. Thomas,"* 81 Fed. 578, Judge Morrow held that to negligently place a keg so near the hatch that it would be liable to fall down the hatch at any time was negligence. The vessel's owners are liable no matter who caused it to fall down the hatch. The principle here in the Sporgeon case is the same, because to place a screw in the way they had it in the deck, so it might "finally come out by itself" (T. 63) is a great deal worse than placing a keg near a hatch. A keg can be seen and avoided. This bolt looking like it might be strong enough to "moor the courthouse to it" (T. 43) was an unseen danger. Judge Morrow says in the *"Joseph B. Thomas"* case:

> "It is a well settled rule that the owner of a vessel owes a general duty to all employed on board that the vessel shall be reasonably safe against accidents or dangers to life or limb."

In *"The Drummelton,"* 158 Fed. 454, a cleat was not sufficient and by reason thereof an engine cover fell over the libelant and injured him. The court said that such a cleat was unsafe and made the vessel not seaworthy, no matter if it was defective when the ship was built or if it became so by the negligence of the crew. This says the court is a duty of the shipowner and is within the exception in *"The Osceola."* *."The Osceola,"* 189 U. S. 158, 47 Law Ed. 760, 23 Sup. Ct. 483. In *Alaska Packers S. S. Co. v. Egan,* 202 Fed. 868, Judge Gilbert speaking for the court says that the negligence to furnish a safe place in which to work on a vessel when loading and unloading, is a hazard not necessarily assumed. Judge Taft in the *Narramore* case, 48 L. R. A. 68, is also holding that the negligence to furnish a reasonably safe place in which to work is not assumed. We are all familiar with the exception in cases where a man is on land, and the exception is that if the servant knows about the dangerous condition that risk is also assumed.

The respondent will likely argue that Spergeon could have used block, and that the court had a perfect right to consider that Spergeon's testimony should be ignored when he said that he could not get any. These blocks were provided just for such work. Judge Hughes speaking for the Supreme

Court had to deal with just such a contention in the case of *Atlantic Transportation Co. v. Imbrovek,* 234 U. S. 52, 59, Aff. 193 Fed. 1019. Justice Hughes says:

> "It is urged that the neglect was that of a fellow servant, and that hence, the petitioner was not liable. Both courts below, however, concurred in the finding that the petitioner omitted to use proper diligence to provide a safe place in which to work."

The judge who tried this case was of the opinion that the duty of an employer on land was the same as on sea, and he said:

> "The duty of a master of ships is the same as any other owner—or of the owner of the ship, is the same as any other employer of labor, that is to say he must use reasonable care to make the place and the instrumentalities with which the seaman works reasonably safe." (T. 74.)

The Fifth C. C. A. say in the case of *Lafourche Packet Co. v. Henderson,* 94 Fed. 873-875:

> "Without discussing the law as in the authorities cited, we are of the opinion that it is not applicable to the case at hand. There must be a different rule as to the risk assumed by a seaman on board the ship from the rule as to the risk assumed by a servant on land."

Judge Wolverton says in *"The Aurora",* 178 Fed. 587, Aff. 191 Fed. 961:

> "It is a bounden duty of the employer to furnish the employee with a safe place to work."

Judge Wolverton says that a workman is not supposed to stop and examine, if the place is safe. He

says just as Judge Brantley speaking for the Supreme Court of Montana, in the case of *Schroeder v. Mont. Iron Works* (supra), in which Hon. Judge Bourquin said the same thing as he has said in the *Spargeon* case, that is, that a servant assumes risk of a defective appliance.

This court in affirming Judge Dooling in *"The Colusa"*, said:

> "The ordinary rule which applies to assumption of risk by a workman is not applicable to the case of a seaman on board a ship, as he has not the privilege of using his own judgment or of quitting the ship's service, if he apprehends the danger."

The citation is from the syllabus to *"The Colusa"*, 248 Fed. 21. To the same effect is *Benedict on Admiralty,* 5th Ed. Sec. 133, page 202, and also *Panama R. R. Co. v. Johnson,* 289 Fed. 964, Aff. in 264 U. S. Rep. 375, 68 Law. Ed. .....

This shows that the duty of a shipowner is entirely different to the duty of a master employing servants on shore. To the same effect is *"The Fullerton"*, 9th C. C. A., 167 Fed. 1.

We think the court made a mistake when it disregarded all plaintiff's testimony as to what was a safe method of fastening a bolt in the vessel. Witness Becker said when he was called for the defendant that "if the force was sufficient it might finally come out by itself." It is difficult to understand how this can be a safe bolt when it might "come out by itself." Very likely the jury would

have believed the plaintiff's witnesses, and would have found that such a way of fastening a bolt was unsafe, as "it might come out by itself, if the force was sufficient", and the court found that the bolt the way it was fastened "was liable to turn and screw out and the friction is likely to tear them (the bolts) loose, as was done in this case". (T. 76.) That is what the court said in directing a verdict.

Any person can see that even for the use of fastening a boom, such a bolt was dangerous. Since it was the duty of the defendants to have safe appliances, it is clear that if the bolt was so badly fastened "that it might come out by itself", was a good reason for a verdict for plaintiff and no reason at all for a verdict for the defendants, unless the law was that the plaintiff assumed the risk of a dangerous appliance.

We submit the following:

(1) Having a loose bolt that looked like you might moor the courthouse to it, so strong did it look (T. 43), but was so weak that it was liable to come out by itself (T. 76), was negligence on the part of the mate who represented the shipowners, and it was not negligence on the part of plaintiff to use it.

(2) If all the evidence given by the witnesses for the plaintiff is entirely ignored, and the evidence given by the defendants is taken as true, in such

event the "fault" as the court terms the acts of plaintiff are contributory negligence and does not come under the doctrine of assumption of risk.

(3) If the plaintiff was guilty of contributory negligence it was for the jury to "apportion the damages according to the negligence of each."

Dated, San Francisco,
October 28, 1925.

Respectfully submitted,
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